STATE OF MICHIGAN

COURT OF APPEALS

MARK VANWORMER,

Plaintiff-Appellant,

v

CONSUMERS ENERGY, CDC ELECTRIC, INC., and DCT ENTERPRISES, INC., d/b/a LITTLE CAESAR PIZZA,

Defendants-Appellees.

UNPUBLISHED
October 23, 2003

No. 240671
Saginaw Circuit Court
LC No. 01-038568-NO

Before: Bandstra, P.J., and Hoekstra and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting the motions for summary disposition filed by defendants Consumers Energy and DCT Enterprises, Inc., d/b/a Little Caesar Pizza.[1] We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff went to a Little Caesars Pizza restaurant in Frankenmuth for lunch. DCT Enterprises operated the restaurant and controlled the premises on which the restaurant was located. Plaintiff parked in the rear of the building and walked to the front along a sidewalk positioned next to the building. One section of the sidewalk had been removed and replaced with dirt. Grass was growing in some portions of the dirt. Consumers had contracted with defendant CDC Electric, Inc., for some utility work on the premises. CDC had removed the section of sidewalk. Plaintiff walked over the dirt instead of stepping onto the asphalt to his left to avoid it, and tripped when his foot hit a hole in the dirt.

Plaintiff filed suit alleging that he was on the premises as a business invitee, and that he tripped on a section of uneven pavement that was overgrown with grass. Plaintiff alleged that

[1] The d/b/a is designated on the order appealed from as "Little Caesar Pizza." However, the restaurant is commonly known as "Little Caesars Pizza."

defendants failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition.[2]

DCT moved for summary disposition, arguing that the condition of the sidewalk was open and obvious, and that no special aspects of the condition made it unreasonably dangerous. Consumers moved for summary disposition, arguing that the condition of the sidewalk was open and obvious and that it had no liability because it was not the entity that performed the work on the sidewalk.

The trial court granted the motions pursuant to MCR 2.116(C)(10), finding that the condition, i.e., the grass covering the uneven spots in the missing section of sidewalk, was open and obvious and that no special aspects of the condition made it unreasonably dangerous in spite of its open and obvious nature. The trial court found that Consumers had no liability because the contract between Consumers and CDC Electric clearly stated that all work was to be performed by CDC, and that Consumers contracted only for results.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2002).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. A possessor of land may be held liable for injuries resulting from negligent maintenance of the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id*., 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

[2] Plaintiff also named Auto Owners Insurance Company as a defendant, and alleged that Auto Owners failed to pay him benefits under a policy issued to Little Caesars Pizza. This claim was dismissed, and Auto Owners is no longer a party to this case.

In his deposition plaintiff admitted that he saw the asphalt driveway and the missing section of sidewalk and the grass as he approached the building, but that he was not watching where he was stepping as he walked quickly along the sidewalk. The fact that plaintiff claimed that he did not see the hole in the uneven terrain in the missing portion of the sidewalk is irrelevant. *Novotney, supra*, 475. While an average person of ordinary intelligence is not required to closely inspect every inch of a surface upon which he or she might step, public policy requires a person to take reasonable care for his or her own safety. *Bertrand, supra*, 616-617. Given that plaintiff admitted that he saw the condition, it is reasonable to conclude that he would not have been injured had he been watching the area in which he was walking. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). The trial court did not err in concluding that the missing section of the sidewalk constituted an open and obvious danger. Plaintiff has failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious nature. *Lugo, supra.*

The contract between Consumers and CDC Electric provided that all work on the premises was to be performed by CDC Electric, and that Consumers contracted only for results. Under these circumstances, the superior has no liability. *Wright v Big Rapids Door & Blind Mfg Co*, 124 Mich 91, 99; 82 NW 829 (1900).

Affirmed.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello